

Nicholas Somers, - - - - - Appellant.

Dorothy Goswill, (*who is also the Administratrix*)
of Nathaniel Franklin, the Appellant's late } Respondent.
Partner, deceased, - - - - - }

A N D

Dorothy Goswill, - - - - - Appellant.

Nicholas Somers, - - - - - Respondent.

The Appellant Somers's CASE.

THE Appellant Somers and Nathaniel Franklin having been Partners together at Exeter for several Years as Merchants, on the 10th of July, 1726. the Partnership was dissolved, and thereupon Franklin left the Appellant, and went immediately to the Respondent Dorothy Goswill's House at Exeter, where he resided and carried on a Trade with or for her till the Time of his Death, which happened the 29th of October, 1727.

That during the Partnership, the Respondent being a Dealer in Remittances, there had been several Transactions between the Partners and her, as well in that Way as in other Ways of Trade, and particularly from the Year 1719. to the End of 1720. there had been many Bills of Exchange drawn for their Use, for Value received, which had been taken by them of her in the usual Course of Dealing, and for which she had been paid at or before the Time of the Draught, according to the known Method of drawing at Exeter.

While the Partnership continued, there was never any Demand on the Account of any of these Draughts, but above a Year after the Dissolution of the Partnership, the Respondent Goswill, upon the 11th of July, 1727. (when Franklin, who had been for several Years before, and was then under a Contract of Marriage with her, lived with her, and carried on a Trade with her Stock) set up a Pretence that Franklin, the 24th of May, 1725. borrowed of her on a promissory Note, signed by him in the Name of himself and the Appellant Somers, 1016*l.* 19*s.* which Note is in these Words, *Borrowed and received of Mrs. Dorothy Goswill One thousand and sixteen Pounds nineteen Shillings, which we promise to pay her or Order on Demand. Witness our Hands in Exon, May 24th, 1725. Somers and Franklin.* But tho' the Note is signed with the Names both of Franklin and the Appellant Somers, the Appellant's Name was set to it by Franklin.

The Appellant, who had never before heard of this Note, or any Debt due to her, being surprized, and requiring some Account thereof, she admitted that no Money was advanced when the Note was given; but afterwards pretending that the Note was made up of some Bills of Exchange drawn in the Year 1720. which she sent Franklin for the Use of the Partnership, she on the 24th of August 1727. six Weeks after such Demand, sent to the Appellant a fictitious Account, whereby she charged the Partnership as Debtors for eight Bills of Exchange of 100*l.* each, as drawn by her between the 22d of April and 7th of August 1720. payable to Somers and Franklin, (tho' in every one of them there were the Words (Value received) and thereby computing Interest upon Interest, in an arbitrary Manner, to answer their Purpose to the Day of giving the Note, which produced the Sum of 1018*l.* 5*s.* 3*d.* being pretty near the Sum of 1016*l.* 19*s.* for which Franklin gave the Note.

The Appellant being no ways privy to the giving of this Note, or to the pretended Loan of the 800*l.* and knowing that all Bills drawn for the Partnership were regularly paid for according to the common Course of Dealings, had great Reason to believe that this was a mere Contrivance between her and Franklin, to charge the Appellant with so large a Sum, which would come into his own Pocket, he being then under a Contract to marry her, and the rather, because in the Year 1720. the Respondent was so far from being able to lend the Money, that she had met with such Losses that she was forced to borrow considerable Sums of Money to support her Credit, which, for want of Money, was almost quite gone at the very Times when those Sums are pretended to have been lent by her, and the Respondent did not pretend that there was any Note or Memorandum given as an Evidence of such Loan, nor so much as any Entry in her own Books of any such pretended Debt, or that she ever gave the least Hint to the Appellant of any such Loan or Debt till 1727. tho' she had seen him during all that Time almost every Week, and sometimes every Day.

Therefore the Appellant Somers, on the 12th of October following, exhibited his Bill in the Court of Chancery against the Respondent Goswill and Franklin, to obtain a Discovery of this Transaction, and of all the Bills and other Dealings between her and the Partners, and to be relieved against this Note, and that it might be delivered up and cancelled, and that the said Franklin and Goswill might respectively account for all Matters touching or relating to the Partnership, and likewise prayed an Injunction to stay any Proceedings at Law on the said Note.

The said Franklin died in the Respondent's House, without answering the Bill, and she on his Death took out Letters of Administration to him.

January 10. 1727. the said Dorothy Goswill put in her Answer, and insisted, that the Consideration of the said Note was as is before mentioned, and thereby admitted that the said Franklin and she were contracted in Marriage when the Note was given; that she had not made the Partnership Debtors in her Books for the Bills; that they all expressed to be drawn for Value received; and that she was then, and ever since, a Borrower of Money, having lost several thousand Pounds in less than a Year before the pretended Loan; and that she might say, If more such Losses should happen, she should fail; and she admitted likewise, that tho' she saw the Appellant Somers from the Year 1720. to the Year 1727. every Week, yet that she did not make any Demand of the said pretended Debt of the Appellant till the 11th of July, 1727. Tho' it appeared by her Answer, and likewise by her Letters to Franklin, that during that Time she not only borrowed Money, but was under such Difficulties for want thereof, that, among many other Expressions of the same kind, she herself saith, that People wondered how she stood it. Yet, notwithstanding this, the Defendant by her Answer insisted on having the Benefit of the Note as and in the Nature of a stated Account, tho' she hath proved no Account stated at the

to July, 1726.
Partnership dissolved.

Pretence of a Debt
due to Goswill.

No Demand thereof,
all a Year after the
Partnership.

Note for 1016*l.* 19*s.*
signed only by Frank-
lin.

Fictitious Account
sent Somers, making
up 1018*l.* 5*s.* 3*d.*
instead of 1016*l.* 19*s.*

Strong Presumptions
of the Fictitiousness
of the Note.

2 October, 1727.
Appellant's Bill.

Franklin died in Gos-
will's House, who ad-
minister'd to him.

10 January, 1727.
Respondent's An-
swer.

On her Answer being reported insufficient, the Respondent exhibits a second, and makes the Balance due only 532 l. 8 s. 7 d. ob.

the Time of giving the Note; but, instead thereof, said, that if a full and just Account of all Matters with the said Somers and Franklin were made up and stated, exclusive of the said Note and Interest, (whereby it appears no Account had ever been made up, this pretended Debt being only composed of Items selected from one Side of an Account) the Balance would be in her Favour some few Pounds only; but offered to accept the Money due upon the Note, and to let all other Matters drop. This Answer being reported insufficient, she put in a second, and thereby exhibited an Extract of all the Bills of Exchange which she drew in Favour of Somers and Franklin, amounting to 6138 l. 4 s. 9 d. including the eight Bills for which she pretends the Note was given, without the least Mark of Distinction from the other Bills, and in such Schedule the said eight Bills are intermix'd with other Bills of Exchange appearing to be delivered at several Times in the same Year, (viz.) between the 15th of April, 1720: and the 6th of August following; and in the same Schedule she sets out an Account of several Sums received, amounting to 5605 l. 16 s. 1 d. ob. But instead of saying those Sums were all that she received on account of the Partners, she only said they were all except what was in Repayment of Money lent them by Money or in Bills, and not brought into any written Account, which, she said, she could not then recollect, yet, even upon the Foot of her own Account, in which she did not pretend to have given the Partnership all the Credit they were intitled to, the Balance to herself, when the Items of her Schedule are cast up, is only 532 l. 8 s. 7 d. ob.

21 Decemb. 1730.

Somers by amended Bill sets forth Errors to the Partnership's Prejudice, to the Amount of 520 l. which reduced the pretended Balance to 12 l. 8 s. 7 d. which the Respondent admits.

In order to reduce this pretended Balance, the Appellant Somers amended his Bill, and obtained from her a Discovery, that a Bill drawn on *Elisba Richardson* for 170 l. the 8th of August 1719, and other Bills on Mrs. Drake, amounting to 250 l. (for all which the Partnership is made Debtor in the Schedule annexed to her former Answer) were returned unpaid, both Drake and Richardson proving insolvent; and that she had also borrowed and received, by the Hands of her Servant *Samuel Peirce*, of the Partnership, the Sum of 100 l. for which the Appellant Somers still hath his Note, and her own Letter, owning and returning Thanks for the Loan of it, dated the 21st of August 1719. and yet she gave the Appellant no Credit for the same in the said Schedule; all which Sums amounted together to 520 l. So that on a Comparison of her own Answers and Schedules, including the said eight Bills pretended to be the Consideration of the Note, only 12 l. 8 s. 7 d. remains due to her, whereupon she herself became so inclinable to own that she had been before in the Wrong, that having in her former Answer sworn that she had, as well as she could, recollected what Bills were returned for Non-payment, she in her third Answer admitted, that upon reviewing her Books it appeared that the Appellant Somers and Partner never had Credit for the said Bills returned, but said she should have been glad if the Appellant would have produced to her the said Bills, without the Expence of a Suit, and pretended that she did not observe the same at the Time of putting in her former Answer; and further, that if there should appear to be any other Error, the same was without her Knowledge, and that she was ready to rectify the same on Notice. And such Effect had this unexpected Discovery on her, that she (who in her two former Answers had been so positive as to aver, that the Value for the eight Bills was unpaid) in her said third Answer, tho' relating to an Act of her own, is no longer positive, but varied the Manner of Denial, and ventures no farther than to say, — that these eight Sums which made up the 800 l. in Question, had not, nor had they or either of them been since repaid, to her Knowledge, Remembrance or Belief, in which there was likewise a plain Evasion, she only saying those Sums had not been since repaid, whereas the Custom was proved to be to pay the Value at or before the Receipt of the Bills.

Trin. 1729. Respondent Gofwill's Cross-Bill.

The Respondent in Trinity Term 1729. exhibited her Cross Bill against the Appellant in her own Right, to be paid the 1016 l. 19 s. and to have an Account of the Dealings between her and the Partnership, and as Administratrix of Franklin to have the Partnership Account taken between them, and to have the Profits thereof accounted for to her.

Somers's Answer.

The Appellant put in his Answer to such Bill, and thereby insisted, that the said Note for 1016 l. 19 s. was a fraudulent Note, and the Account, if any settled, was fraudulent, without the least Notice to him, and without his Knowledge, Consent or Privity, and expressly swore that he never knew nor heard any thing of the said Note for 1016 l. 19 s. nor did the Respondent make any Demand thereof, or of the Money pretended to be the Consideration thereof, till 1727. tho' the Respondent and the Appellant very often met and discoursed together, as well in 1720. as at other Times; and he insisted by his Answer, that as Value received is expressed in the Bills themselves, the Fact ought to be taken to be so, unless the contrary be proved; and the rather since no Notice was taken of any of the said Bills in any Entry or Entries in any of the Partnership Books of Account.

Verdict at Law.

Mrs. Gofwill proceeded to a Trial at Law on the Note, against which the Appellant could not defend himself, in regard the said Note was undoubtedly wrote by the said Franklin, and dated within the Time of the Partnership: And on Proof only of the Partnership, and that the Note was the Hand-writing of Franklin, she obtained a Verdict for 1141 l.

20 October, 1730.

The Appellant moved his Lordship to revive the Injunction, which had been formerly dissolved upon the Allowance of the Plea of the Respondent to another Part of the Appellant's Bill, no ways relating to this Note; and it was ordered, that upon the Appellant Somers's bringing the Sum of 570 l. 10 s. a Moiety of the Money recovered at Law into the Bank of England, by the last Day of the then next Term, subject to the Order of Court, the said Injunction was to stand revived, which the Appellant paid into the Bank accordingly, where the same still remains.

Respondent Gofwill herself proved that Notes are always given for Bills lent, expressing Value received.

Issue being joined in both Causes, divers Witnesses were examined, and on the Part of the Appellant Somers, it was proved to be the common Practice in Exeter to pay Money for Bills on Friday the Market Day, and not to take the Bills till Saturday the Post Day, and the Respondent Gofwill, who attempted to prove, that the Words, VALUE RECEIVED, were not to be regarded, bath by all her Witnesses proved, that if Sums are lent by such Bills, tho' for no longer Time than a Month, Notes of Hand are taken, if Value is mentioned to be received in the Bills, but if 'tis said Value in Account, then the Sums for which the Bills are drawn are carried to Account.

16 Novemb. 1731. Decree of his Honour the Master of the Rolls.

The said Causes came on to be heard before his Honour the Master of the Rolls, who was then pleased to order, that upon the Original Bill a general Account be taken of the Dealings between the Appellant and his Partner Franklin with the Respondent, and declared that the Note of the 24th of May 1725. for 1016 l. 19 s. ought not to be taken into the Account; and what, if any thing, should be found due to the Complainant and his Partner, from the Defendant Gofwill, the Appellant's Moiety thereof, as also the Moiety of Franklin, is to wait in the Hands of the Defendant Gofwill, the Event of the Account therein after-directed of the Partnership Estate; but if upon this Account any thing should be found due from the said Appellant Somers, and his Partner Franklin, then the said Appellant Somers was to pay the same to the said Gofwill, and that the Judgment obtained on the said Note should stand as a Security for the same; and upon the Appellant's Payment thereof to the Defendant Gofwill, or if there should not be any thing due to her on the Account, then she was at the Appellant's Charge to acknowledge

ledge Satisfaction on the said Judgment, and to deliver up the said Note, and the Injunction obtained by the Appellant, was thereby continued in the mean time, and the Sum of 570 l. 10 s. brought into the Bank, was ordered to be placed out on *South Sea Annuities*, subject to the Order of the Court, and an Account was directed to be taken of the Partnership between the said *Goswill*, as Administratrix of the said *Franklin* and the Appellant, and the Consideration of the Costs of these Suits was thereby reserved.

18 Novemb. 1732.
Lord Chancellor's
Decree.

From which Decree of the Master of the Rolls, the Respondent appealed to the Right Honourable the Lord High Chancellor of *Great Britain*; and the said Causes coming to be heard on the Appeal on the 18th Day of *November* 1732. his Lordship was pleased to order that the said Decree should stand with this, that in taking of the said Account the Respondent *Goswill* should be at Liberty to produce the said Note of the 24th of *May* 1725. for 1016 l. 19 s. as Evidence before the Master, but not as conclusive Evidence.

Somers's Appeal.

The Appellant *Somers* being advised that he was aggrieved in such Part of the Lord Chancellor's Decree, which directs, that in taking the said Account Mrs. *Goswill* should be at Liberty to produce the said Note, dated the 24th of *May*, as Evidence before the Master, hath appealed from the same to your Lordships. After which Appeal the said Mrs. *Goswill* thought proper to exhibit her Cross Appeal, alleging, that she was aggrieved by the Decree, because the Sum found by the Verdict at Law was not thereby directed to be taken into the said Account; and that if an open Account was to be taken between her and the Partners, yet that no Direction ought to have been in such Decree to deprive her of the Benefit of any Evidence that might arise in the taking of the said Account.

Mrs. Goswill's Cross-
Appeal.

The Appellant *Somers* humbly apprehends that there is not the least Reason for the Respondent *Goswill*'s Cross Appeal, but hopes that his Appeal is well founded, and that the said Note ought not to be permitted to be brought into the Account, or given in Evidence at all, for the following REASONS, amongst others;

- I. For that the Note being the only controverted Thing in the Cause, to say that the Note shall be produced as Evidence in taking an Account directed on Purpose to see whether the Note was fairly obtained, is to direct the Note to be given in Evidence in support of itself, and is in some Measure determining in Favour of the Note; whereas it is apprehended that no Regard ought to be had to a Note given under such Circumstances, and liable to so many Objections.
- II. For that the said Note was given by *Franklin*, without the Privity of the Appellant his Partner, at a Time when he was under a Contract of Marriage with Mrs. *Goswill*, so that by giving a Note to her, he gave it in Effect to himself.
- III. For that it is expressed in the said Note, that it was given for so much Money borrowed and received, and yet now it is not so much as pretended that any Money was then borrowed of the Respondent, or received by *Franklin*.
- IV. For that as no Consideration in Money was paid at the Time of giving the Note, so the Bills of Exchange, which are the only pretended Consideration, prove the contrary to what she insists on, they being expressed to be for Value received, which is the constant known Evidence of the Payment, and an Evidence that the Money was paid for them at the Time when they were drawn, and ought to be a conclusive one in this Case, since there are so many concurrent Circumstances, and no Evidence to the contrary.
- V. For that if the Case had been otherwise, it is incredible that those Bills should have lain from the Year 1720, to the Year 1725. unpaid for, unsecured, unentered in her Books, and till 1727. undemanded, especially since it is admitted by her Answer that she had met with great Losses about that Time, that she was forced to borrow Money to support her Credit, and was under great Apprehensions of failing in the World; and yet she does not pretend that she ever demanded either Principal or Interest during all that Time, or that the Partners were incapable or unwilling to pay either.—She took no Note or Writing to signify that the Sums included in those Bills were a Loan to the Partners.—She never made any Entry or Memorandum of it, even in her own Books, in which these very Bills are entered, in the same Manner as all the other Bills are which are admitted to have been paid, and are only pick'd out of a great many others of the same Sort: And what makes the Fraud the more manifest, is the Reason she assigns for not making any Entry in her Books, alleging, that the Bills were not entered, not because they were intended to be paid immediately, but because they were intended to lie at Interest for some Time, which is very inconsistent with what the Respondent herself says in the Sentence next preceding, where she gives it as a Reason why several other Bills of Exchange and Money lent them were not entered, because they were paid again soon.
- VI. For that tho' she admits that she saw the Appellant every Week, and frequently every Day in the Week, yet she does not pretend that she ever gave the least Notice to him of any such Loan or Note till the 11th of *July* 1727.
- VII. For that it is not proved that this Note was actually given at the Time it bears Date, and from the Circumstances it is most probable that it was given after the Dissolution of the Partnership, tho' dated before; or if it was really given before, yet from the Nature of the Account, which she now thinks fit to insist upon as the Consideration of it, the arbitrary Method of computing Interest upon Interest, it is manifest that this Account was made up, not as the Foundation of giving the Note, but to make a Consideration for it after it was given, being carried down home to 1727. the Time of the Demand; and the rather, because tho' the Note is insisted upon in the Answer to be in the Nature of a stated Account, yet the Account for the Balance, of which that Note is supposed to be given, was never produced, nor is there the least Proof that any such Account was really made up at the Time of giving the Note: On the contrary, it appears by her own Answer, that the Account she thought fit to send to the Appellant was made up by the Assistance of *Franklin*, a great while afterwards, without whom, it seems, she was not able to draw it out, nor knew what Demand to make.
- VIII. For that the Respondent can have no Injury done her by setting aside this Note, because she will still in the General Account which is directed by the first Decree, have the Benefit of any Sums of Money that were really paid by her, or any Bills for which she received no Consideration; whereas to admit of this Note to be Evidence of so much Money due, would be to admit of the single Evidence of *Franklin* in Favour of himself.

As to the Verdict at Law, as one Partner has a Right in Point of Law to bind the other, a Verdict must necessarily be given for the Respondent, upon proving the Hand of *Franklin* only, but all the Evidences and Circumstances of Fraud above-mentioned, were not nor could be properly given in Evidence before the Jury, but are the strongest Reasons for a Court of Equity to interpose, and prevent the Respondent from having the Benefit of a Note for which she gave no Consideration.

For which, and divers other Reasons, the Appellant *Somers* hopes that your Lordships will be pleased to reverse that Part of the Lord Chancellor's Decree, against which the Appellant hath appealed, and to make such Order as shall be reasonable for the Appellant *Somers*'s Relief; and that your Lordships will be pleased to Dismiss the said Cross Appeal of the Respondent *Goswill*, with Costs.

J. WILLES.
D. RYDER.

Nicholas Somers,

Appellant,

Dorothy Gosnell,

Respondent,

Et e contra.

The Appellant Somers's CASE.

To be Heard at the Bar of the House of Lords, on Wednesday, February 6. 1734.

